

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

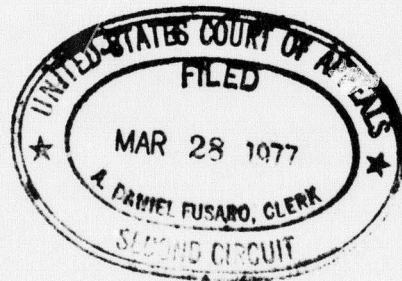
77-7011

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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: JEFF TRACHTMAN, et al., :
: :
: Plaintiffs-Appellants, :
: :
: -against- : Docket Number
: :
: IRVING ANKER, etc., et al., : 77-7011
: :
: Defendants-Appellees. :
: :
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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF THE STATE OF NEW YORK

REPLY BRIEF OF PLAINTIFFS-APPELLANTS



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REPLY BRIEF OF PLAINTIFFS-APPELLANTS

SPECULATIVE ASSERTION OF POTENTIAL HARM MAY NOT JUSTIFY
THE ABRIDGEMENT OF HIGH SCHOOL STUDENTS' FIRST AMENDMENT
RIGHTS

The crux of the issues in this case may be found in defendants' assertion that: "If there is a significant possibility that even one or two will be harmed, the risk is sufficient to warrant the appellees' [defendants] decision to prohibit distribution." (Defendants' brief p. 25). In support, defendants cite Merriken v. Cresman, 364 F.Supp. 916, 920 (E.D.Pa. 1973) and Shanley v. Northeast Independent School District, 462 F.2d 960, 970 (5th Cir., 1972).

The "heckler's veto" averted to in plaintiffs' brief in chief is raised to militate against the operation of plaintiffs' rights guaranteed by the First Amendment is bolstered by a most tenuous series of speculations. The factual basis for defendants'

conclusion that there is a "significant possibility" of harm being visited upon students at Stuyvesant High School include such assertions that plaintiffs' proposed questionnaire "constitutes a potentially harmful exposure to some students." (Dr. Paster A-75); " . . . I cannot attest with certainty that harm will result from the distribution of the survey, it is my expert opinion that emotional and psychological harm is likely to occur and the chance of this happening is far greater than the possibility that no children will be injured, if it were distributed. (Dr. Halpern A-126); "It is my view that this single 'survey' . . . is potentially dangerous . . ." (Dr. Esman A-130); "The potential harm that it may do to even a minority of students is in no way, therefore, offset by the value of any information that it could elicit. (Dr. Paster, supplementary affidavit A-132); "Plaintiffs' experts do not refute defendants' claim of potential harm, but in fact strengthens it." (Siegel A-153) (Emphasis supplied).

The defendants' reliance on the reasoning in Shanley, supra is miscase. The Court there, in enjoining discipline visited upon high school students who distributed a student publication viewed by the school authorities as controversial, engaging in extensive analysis of the nature of the ". . . facts which might

reasonably have led school authorities to forecast substantial disruption of, or material interference with school activities . . . " required by Tinker v. Des Moines Independent Community School Dist. 393 U.S. 514, stated:

"We have discussed potential disturbance a great deal, for in substance that is what school discipline is designed to prevent. However, we must emphasize in the context of this case that even reasonably forecast disruption is not per se justification for prior restraint or subsequent punishment of expression afforded to students by the First Amendment:

* * *

Reasonable regulation of expression is constitutionally preferable to restraint:

* * *

If the content of a student's expression could give rise to a disturbance from those who hold opposing views, then it is certainly within the power of the school administration to regulate the time, place and manner of distribution with even greater latitude of discretion. And the administration should, of course, take all reasonable steps to control disturbances, however generated. We are simply taking note here of the fact that disturbances themselves can be wholly without reasonable or rational basis, and that those students who would reasonably exercise their freedom of expression should not be restrained or punishable at the threshold of their attempts at expression merely because a small, perhaps vocal or violent, group of students with differing views, might or does create a disturbance.

* * *

We emphasize, however, that there must be demonstrable factors that would give rise to any reasonable forecast by the school administration of 'substantial and material'

disruption of school activities before expression may be constitutionally restrained. While this Court has great respect for the intuitive abilities of the administrators, such paramount freedoms as speech and expression cannot be stifled on the sole ground of intuition." Shanley v. Northeast Independent School Dist. 462 F.2d 960,973-4 (5th Cir., 1972).

Here, the defendants' attempt to abridge plaintiffs' First Amendment rights by a view of the potential harm that would be visited upon speculative minority of the school population when they are requested by their fellow students, their peers, to anonymously complete a questionnaire precisely contemplates disturbance that is without reasonable or rational basis. Defendants compel a conclusion they may abridge constitutionally protected expression if they can persuasively advance the existence of even one or two high school students whose egos are so fragile that they will become anxious if a fellow student request them to complete an anonymous questionnaire. Plaintiffs assert the improbability of any harm being visited upon any of the high school students to whom the questionnaire may be presented. Nonetheless even were it to be successfully demonstrated that there do indeed exist that exceedingly small minority of students who are so susceptible that they may become anxious upon presentation of the plaintiffs' survey, plaintiffs' First Amendment rights may not be invaded on the basis that free expression may

irrationally affect a small minority. Particularly a minority not reasonably shown to exist but "intuitive". The Court in Shanley, supra, in anticipating that school authorities will seek to restrain student publications of materials asserted to be disruptive though not considered to be obscene, libelous or inflammatory, stated that in those situations:

"We do conclude, however, that the school Board's burden of demonstrating reasonableness comes geometrically heavier as its decision begins to focus upon the content of materials that are not obscene, libelous, or inflammatory." Shanley v. Northeast Ind. supra 462 F.2d 971.

The burden upon the defendants to demonstrate that their restraint was reasonable has not been met. It cannot be met by even expert speculation of potential anxiety which might be experienced by a supposedly existent minority of the school population. Plaintiffs submit that even a factual showing of certain psychological anxiety being aroused in a minority of the school population cannot sustain the abridgement of plaintiffs' constitutional right to freedom of expression. Particularly is this the case in the light of the well reasoned program for school distribution and publication of the questionnaire contained in the opinion of the Court below. The provision in Judge Motley's order for the availability of public and private discussion groups reasonably meets all of the defendants' speculative concerns for the existence of a minority

that might be psychically disturbed by presentation of the questionnaire.

The inapposite adoption by the plaintiffs of the reasoning in Merriken v. Cressman, supra, 364 F.Supp. 916, highlights defendants' failure to understand the sweep of the First Amendment principles that are applicable to the issues here. Merriken properly decided that a state sponsored, prepared and distributed survey to be utilized in a drug prevention program would have a coercive effect on students to whom it was presented, even if they were permitted to refuse to respond. In asserting the invalidity of the survey and enjoining its distribution as abusing students' rights of privacy, the court was not confronted as this Court is, by the assertion of First Amendment rights by the propounders of the survey there proposed. On the contrary the Court was confronted with weighing the right of government to invade an asserted right of privacy, and found in favor of privacy.

"The Court, in balancing the right of an individual to privacy and the right of the Government to invade that privacy for the sake of public interest, strikes the balance in favor of the individual in the circumstances shown in this case. In short, the reasons for this are the tests itself and the surrounding results of that test are not sufficiently presented to both the child and the parents, as well as the Court, as to its authority and credibility in fighting the drug problem in this country."

In authority for its conclusion the Court cited Barenblatt v.

U.S. as follows:

"Where First Amendment rights are asserted to bar governmental interrogation, resolution of the issue always involves a balancing by the courts of the competing private and public interest at stake in the particular circumstances shown." 360 U.S. 109, 126 (Merriken v. Cresman, 364 F.Supp. 921).

That principle is indeed pertinent to the issues here. The defendants have the burden of demonstrating a compelling public interest to defeat plaintiffs' First Amendment interests. That defendants act in good faith or indeed reasonably does not authorize school authorities to dispossess plaintiffs of fundamental First Amendment rights without a conclusive showing of compelling state interests to limit freedom of expression. The defendants' submission that a psychologically aberrant school population may be affected by the innocuous questionnaire supports a dangerous principle that the right to free expression must be measured by its impact on the psychologically immature. That principle seemingly advanced by defendants would authorize them to with impunity, censor student publications of any controversial data. Certainly there were students in the Des Moines Iowa high schools in December, 1965 who supported the war in Viet Nam to which student petitioners in Tinker v. Des Moines Independent School District, supra, objected. Just as certainly, wearing of

the black armbands aroused emotions, not to say hostility, in students supporting the war. No doubt the Independent School District there could have provided a roster of experts as the defendants here, to demonstrate the psychic disturbance that would be experienced by the brothers and sisters of Des Moines High School students whose elder siblings who were in military service in Viet Nam. But the test as enunciated by the Supreme Court was that disruption that would warrant the invasion of First Amendment rights must be "substantial". If this case approaches a threshold question as to the limits of First Amendment incursions to be placed on the school officials upon the apprehension of psychic disturbance, it is submitted that school officials seeking to burden constitutional rights must show substantial psychic disturbance to be the result of the exercise of free speech were that exercise to be interfered with. It is defendants' burden to make that showing. This they have not done nor, in the circumstances of the dispute before the Court, can they do. . The postulated harm is undemonstrable, as postulated is insubstantial, and in the framework of the carefully detailed order below does not warrant an invasion of plaintiffs' constitutionally protected rights.

CONCLUSION

The Order of the Court below should be modified to enlarge its scope to include all of the students at Stuyvesant High School and as so modified, affirmed.

Respectfully submitted,

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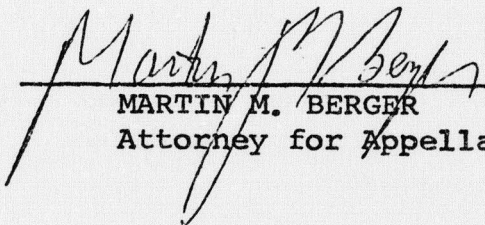
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CERTIFICATE OF SERVICE

This is to certify that I have caused to be served a copy of the foregoing Reply Brief for Appellants upon the counsel of record for Appellees at their office address, Municipal Building, New York, New York 10007, by personal service.

This 28th day of March, 1977.



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